Progress Centre Engineering Sdn Bhd v Desaru Corniche Hotel Sdn Bhd & Anor

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO WA-24C-187–09 OF 2022
ALIZA SULAIMAN J
20 MARCH 2023

Building and Construction Law — Construction Industry Payment and Adjudication Act 2012 ('the CIPAA') — Direct payment from principal — Plaintiff as subcontractor obtained adjudication decision under CIPAA in respect of monies owing to it for work done — Main contractor failed to pay plaintiff adjudicated sum — Whether plaintiff had right under s 30 of the CIPAA to sue main contractor's principal for direct payment of adjudicated sum

The first defendant ('Desaru') had appointed the second defendant ('MRCB') as the main contractor for a building project. In turn, MRCB, through its wholly-owned subsidiary and agent, MRCB Builders Sdn Bhd ('MRCB Builders') appointed the plaintiff as the subcontractor to carry out the mechanical and electrical works in the project. When MRCB Builders failed to pay the plaintiff RM1,071,856.25 ('the claimed sum') due under an interim payment certificate, the plaintiff commenced adjudication proceedings under the Construction Industry Payment and Adjudication Act 2012 ('the CIPAA') for recovery of the said sum. Following a hearing, the adjudicator ordered MRCB Builders to pay the plaintiff the claimed sum together with interest, party-and-party costs and the costs and expenses of the adjudication (collectively called 'the adjudicated sum') within 14 days. Since the plaintiff failed to obtain payment of the adjudicated sum from either MRCB Builders or MRCB (the plaintiff considered them both as one entity), it requested settlement of the sum from Desaru. When Desaru also failed to respond to the payment request, the plaintiff filed the instant originating summons ('OS') for a determination of who was the 'principal' within the meaning of s 4 of the CIPAA that was liable to settle the adjudicated sum under s 30 ofthe CIPAA.

Held, allowing the OS and ordering Desaru as the 'principal' to pay the adjudicated sum to the plaintiff within 14 days:

(1) The court was satisfied from the evidence that both the plaintiff and MRCB had established the existence of a principal-agent relationship between MRCB Builders and MRCB and that this relationship was recognised and accepted by Desaru at all material times during the construction period (see para 33).

(2) By its conduct, Desaru had treated MRCB and MRCB Builders as one

and the same. Consequently, MRCB and MRCB Builders were placed on the same lateral level in the chain of construction contracts as the main contractor for the project. This meant that Desaru was the employer of the project and the 'principal' for the purposes of s 30 of the CIPAA (see para 34).

(3) The facts of the case showed that there were monies due and payable by Desaru to MRCB in respect of certain variation works and this was conceded to by Desaru's counsel during the hearing. Accordingly, the plaintiff's OS was allowed and Desaru was ordered to pay the plaintiff the adjudicated sum, as determined by the adjudicator, within 14 days (see paras 3, 44 & 46).

[Bahasa Malaysia summary

Defendan pertama ('Desaru') telah melantik defendan kedua ('MRCB') sebagai kontraktor utama untuk sebuah projek bangunan. MRCB kemudiannya melalui anak syarikat dan ejen yang dimiliki sepenuhnya, MRCB Builders Sdn Bhd ('MRCB Builders') melantik plaintif sebagai subkontraktor untuk menjalankan kerja-kerja mekanikal dan elektrikal di dalam projek itu. Apabila MRCB Builders gagal membayar kepada plaintif sebanyak RM1,071,856.25 ('jumlah yang dituntut') yang perlu dibayar di bawah sijil pembayaran interim, plaintif telah memulakan prosiding penghakiman di bawah Akta Pembayaran dan Adjudikasi Industri Pembinaan 2012 ('APPIP') untuk mendapatkan semula jumlah tersebut. Selepas perbicaraan, hakim memerintahkan MRCB Builders membayar jumlah yang dituntut plaintif bersama-sama dengan faedah, kos pihak dan pihak serta kos dan penghakiman (secara kolektif dipanggil 'jumlah adjudikasi') dalam masa 14 hari. Oleh kerana plaintif gagal mendapatkan pembayaran jumlah adjudikasi sama ada dari MRCB Builders atau MRCB (plaintif menganggap kedua-duanya sebagai satu entiti), mereka menuntut penyelesaian jumlah itu dari Desaru. Apabila Desaru juga gagal menjawab tuntutan pembayaran itu, plaintif memfailkan saman pemula ini ('SP') bagi menentukan siapa 'prinsipal' menurut s 4 APPIP yang bertanggungjawab menyelesaikan jumlah adjudikasi menurut s 30 APPIP.

Diputuskan, membenarkan SP dan memerintahkan Desaru sebagai 'prinsipal' membayar jumlah adjudikasi kepada plaintif dalam tempoh 14 hari:

(1) Mahkamah berpuas hati dengan keterangan bahawa kedua-dua plaintif dan MRCB menunjukkan terdapat hubungan ejen utama antara MRCB Builders dan MRCB dan ianya diakui oleh Desaru pada setiap masa material semasa di dalam proses pembinaan projek itu (lihat perenggan 33).

(2) Tindakan Desaru menunjukkan bahawa urusannya dengan MRCB dan MRCB Builders seolah-olah mereka adalah entiti yang sama. Oleh itu,

MRCB dan MRCB Builders adalah di dalam rantaian kontrak pembinaan sebagai kontraktor utama bagi projek tersebut. Ini bermakna Desaru adalah majikan kepada projek itu dan merupakan 'prinsipal' menurut s 30 APPIP (lihat perenggan 34).

(3) Fakta kes menunjukkan bahawa terdapat wang yang perlu dibayar oleh Desaru kepada MRCB berkenaan dengan kerja-kerja variasi tertentu dan ini telah diakui oleh peguam Desaru semasa perbicaraan. Sehubungan itu, SP plaintif dibenarkan dan Desaru diperintahkan membayar jumlah adjudikasi kepada plaintif seperti yang diputuskan, dalam tempoh 14 hari (lihat perenggan 3, 44 & 46).]

Cases referred to

B Cor Geotechnics Sdn Bhd v Panzana Enterprise Sdn Bhd [2019] MLJU 1030; [2019] MLRHU 1040, HC (refd)

Bond M&E Sdn Bhd v Pali PTP Sdn Bhd [2022] 11 MLJ 58; [2022] 5 CLJ 543; [2022] 5 MLRH 279, HC (refd)

CT Indah Construction Sdn Bhd v BHL Gemilang Sdn Bhd [2017] MLJU 2275; [2018] 1 LNS 380, HC (refd)

Cabnet Systems (M) Sdn Bhd v Dekad Kaliber Sdn Bhd & Anor [2020] MLJU 311; [2020] 3 MLRH 83, HC (refd)

Chong Lek Engineering Works Sdn Bhd v PFCE Integrated Plant and Project Sdn Bhd and another case [2020] MLJU 2389, HC (refd)

Glocal Tech Engineering Sdn Bhd v Panzana Enterprise Sdn Bhd [2021] MLJU 474, HC (refd)

HMN Nadhir Sdn Bhd v Jabatan Kerja Raya Malaysia & Ors [2018] MLJU 1859, HC (refd)

KGN Jaya Sdn Bhd v Pan Reliance Sdn Bhd [1996] 1 MLJ 233, CA (refd)

Murni Environmental Engineering Sdn Bhd v Eminent Ventures Sdn Bhd & Anor and other suits [2016] MLJU 691, HC (refd)

PCOM Pacific Sdn Bhd v Apex Communications Sdn Bhd [2020] MLJU 118, HC (refd)

Puncak Alam Housing Sdn Bhd (formerly known as Bukit Cerakah Development Sdn Bhd) v Menta Construction Sdn Bhd & Anor [2014] 1 MLJ 287, CA (refd)

Sri Sutera Sdn Bhd v Mohamed bin Abid and another appeal [2004] 2 MLJ 321, CA (refd)

Yap Chee Hean v Public Investment Bank Bhd [2014] 8 MLJ 494, HC (refd)

Zedelta Sdn Bhd v Mayland Supreme Sdn Bhd [2023] 10 MLJ 95, HC (refd)

Legislation referred to

Construction Industry Payment and Adjudication Act 2012 ss 5, 4, 30, 30(1), (2), (4)

Contracts Act 1950 s 140

Interpretation Acts 1948 and 1967 s 17A

James Ding Tse Wen (with Teoh Ting Wei) (CH Tay & Partners) for the plaintiff.
Raja Kumar Raja Kandan (with Koh Yi Ting and Ng Chu Yin) (Azman Davidson & Co) for the first defendant.
Muhammad Faisal Moideen (with Julian Ch'ng Wei Shen and Syaarifah Ameerah bt Syed Haja Muyinudeen) (Moideen & Max) for the second defendant.

Aliza Sulaiman J:

INTRODUCTION

[1] This suit by the plaintiff against the defendants pursuant to s 30 of the Construction Industry Payment and Adjudication Act 2012 (Act 746) ('the CIPAA') involves two main issues as to who is the 'principal' within the meaning of s 4 of the CIPAA and whether there are monies due and owing by the 'principal' to MRCB Builders Sdn Bhd ('MRCB Builders'), the party against whom the adjudication decision dated 24 May 2022 ('AD') by the learned adjudicator Mr Sew Chee Hoong ('adjudicator') in the adjudication proceedings between the plaintiff and MRCB Builders was made.

[2] In the originating summons ('OS'), the plaintiff sought an order for the first defendant, Desaru Corniche Hotel Sdn Bhd ('Desaru') or alternatively, the second defendant, Malaysian Resources Corp Bhd ('MRCB') to pay the sum of RM1,071,856.25 ('adjudicated sum') to the plaintiff immediately or within such period that the court thinks fit and proper.

[3] The matter was called for hearing on 16 January 2023 and was adjourned to today, 20 March 2023 for decision whereby, the court, after careful deliberation of the cause papers and submissions by the parties, has pronounced that Desaru is the 'principal' and that there are monies due and owing by Desaru to MRCB Builders as at 27 July 2022. The plaintiff's application was accordingly allowed in that Desaru was ordered to pay the adjudicated sum together with interest, party-to-party cost and the costs and expenses of the adjudication as determined by the adjudicator within 14 working days of the decision of this court. Desaru was also ordered to pay cost of RM5,000 to the plaintiff, subject to allocatur. As MRCB's counsel also prayed for cost and upon the plaintiff's counsel conceding that it is the plaintiff, and not Desaru, who had named MRCB as a party in this suit, and further, upon the plaintiff's counsel offer to pay RM5,000 as cost to MRCB, the court had ordered the plaintiff to pay cost of RM5,000 to MRCB, subject to allocatur.

A THE CAUSE PAPERS

[4] The cause papers for this suit are as follows:

(a) the originating summons ('OS') dated 30 September 2022 (encl 1);

B (b) the plaintiff's affidavit in support ('AIS') affirmed by its Accounts & HR Manager, Noor Husna bt Ab Rahman on 30 September 2022 (encl 2);

(c) MRCB's affidavit in reply ('AIR') affirmed by its Group Chief Operating Officer, Kwan Joon Hoe on 31 October 2022 (encl 6);

C (d) Desaru's AIR affirmed by its Group Managing Director, Stephanie Saw Ai Lin on 31 October 2022 (encl 7);

(e) the plaintiff's affidavit (2) affirmed by the same deponent on 14 November 2022 (encl 10);

D (f) MRCB's AIR affirmed by the same deponent on 29 November 2022 (encl 13);

(g) MRCB's further AIR affirmed by the same deponent on 30 November 2022 (encl 15); and

E (h) Desaru's AIR (2) affirmed by the same deponent on 9 December 2022 (encl 16).

SALIENT FACTS

F **[5]** The plaintiff, Desaru, MRCB and MRCB Builders are all companies which have been incorporated in Malaysia.

[6] The plaintiff has its business address at No 40–1, Jalan PJS 1/50, Taman Petaling Utama Avenue, 46000 Petaling Jaya, Selangor.

G

[7] Desaru's registered address is at Level 8, Surian Tower, No 1 Jalan PJU 7/3, Mutiara Damansara, 47810 Petaling Jaya, Selangor whilst MRCB's registered address is at Level 33A, Menara NU 2, No 203 Jalan Tun Sambanthan, Kuala Lumpur Sentral, 50470 Kuala Lumpur.

H

[8] MRCB Builders is MRCB's wholly owned subsidiary company, and having its registered address at Level 33A, Menara NU 2, No 203, Jalan Tun Sambanthan, Kuala Lumpur Sentral, 50470 Kuala Lumpur and business address at Level 30, Menara Allianz Sentral, No 203, Jalan Tun Sambanthan, Kuala Lumpur Sentral, 50470 Kuala Lumpur.

I

[9] By the letter of acceptance dated 18 June 2015, Desaru had accepted MRCB's revised tender submission as the main contractor for the project

known as 'The Proposed Westin Desaru Resort at Desaru, Johor Darul Takzim for Desaru Corniche Hotel Sdn Bhd' ('project') for the sum of RM211,600,000 excluding Goods and Service Tax.

[10] Subsequently, via a letter of award dated 1 December 2015 ('LoA'), MRCB through its agent, MRCB Builders had appointed the plaintiff as the subcontractor for the Mechanical and Electrical Works in respect of the project ('M&E works') for the fixed lump sum amount of RM32,587,368.

[11] Due to MRCB Builders's purported non-payment of interim payment certificate ('IPC') No 31 which was issued on 27 July 2021 in the sum of RM1,071,856.25, the plaintiff had on 24 November 2021 served a payment claim pursuant to s 5 of the CIPAA to MRCB Builders.

[12] The adjudication proceedings which commenced on 21 December 2021, resulted in the following determination by the adjudicator:

S. Determination

115. I have carefully considered the evidence submitted to me in this adjudication proceedings. Based on the evidence, arguments and for all the reasons above, I accordingly *FIND, DECLARE, DETERMINE AND AWARD* as follows:

a) The Respondent shall pay the Claimant the adjudicated sum of *RM1,071,856.25*.

b) The Respondent shall pay the Claimant simple interest per annum (see table below) for the adjudicated sum. The interest shall be calculated from the due date of the outstanding sum to the date of this decision tabulated as below:

Item	Description	Adjudicated sum (RM)	Payment Due Date	Interest Rate (%)
1	Payment under Interim Payment Certificate No 31	1,071,856.25	10.09.2021	5%

c) The Respondent shall pay the adjudicated sum and the interest sum within fourteen (14) days from the date of this decision in the form of a secured financial instrument.

d) The Claimant is entitled to a further simple interest per annum (see table above) for any amount of the adjudicated sum and interest sum remaining unpaid after fourteen (14) days from the date of this decision until actual payment.

e) The Respondent shall pay the Claimant the sum of *RM35,000.00* as party-to-party cost within fourteen (14) days from the date of this decision.

f) The Respondent shall pay the Claimant the sum of *RM25,132.15* for the

costs and expenses of the adjudication including the adjudicator's fees and expenses, AIAC's fees and expenses and all government taxes within fourteen (14) days from the date of this decision. Failing which, the Claimant is entitled to simple interest rate of 5% per annum until full payment.

g) All other claims are hereby dismissed.

[13] On 7 June 2022, the plaintiff's solicitors forwarded the AD to MRCB Builders and demanded for the sums under the AD.

[14] MRCB Builders thereafter wrote to MRCB on 21 June 2022, enclosing the plaintiff's solicitors letter dated 7 June 2022 and seeking MRCB's position in relation to the plaintiff's demand.

[15] On 23 June 2022, MRCB replied to MRCB Builders that, at all material times, MRCB Builders was acting as an agent with ostensible authority to do all matters necessary, including appointment of the subcontractor, in respect of the project. MRCB informed that it has yet to receive any payment from the employer in respect of the claims for the outstanding sum as mounted by the plaintiff in the adjudication and accordingly, there is no amount due and owing payable by MRCB to the plaintiff.

[16] MRCB Builders then wrote to the plaintiff's solicitor vide letter dated 29 June 2022, stating that the plaintiff is aware, and have accepted, that MRCB Builders was merely acting as an agent to MRCB in respect of the contract and that this was the finding in the AD. Further, MRCB Builders conveyed the gist of MRCB's letter dated 23 June 2022 to the plaintiff's solicitor.

[17] Subsequently, on 27 July 2022, the plaintiff's solicitors issued the request pursuant to sub-s 30(1) of the CIPAA to Desaru ('Request — Desaru') for the adjudicated sum and interest of 5%pa on the adjudicated sum from 10 September 2021 until 24 May 2022 amounting to RM37,735.21, RM35,000 as party-to-party costs and RM25,132.15 for the costs and expenses of the adjudication including the adjudicator's and AIAC's fees and expenses (these amounts shall hereinafter be referred to as the 'total adjudication sum') to be paid to the plaintiff's solicitors as stakeholder. Desaru did not respond to the Request — Desaru.

[18] Out of the abundance of caution, on 27 July 2022, the plaintiff's solicitors additionally issued the request pursuant to the same provision of the CIPAA to MRCB ('Request — MRCB') for the total adjudication sum to be paid to the plaintiff's solicitors as stakeholder. In sub-paras 2(ii) and (iii) of the letter to MRCB, the plaintiff acknowledged that MRCB Builders was merely

MRCB's agent in regard to the project and that the plaintiff was aware of this fact at all times. A

[19] MRCB responded to the Request — MRCB by way of its letter dated 28 July 2022 to the effect that the correct party for the plaintiff to direct its claim would be against Desaru as the employer and 'principal' in the chain of contract. B

[20] As no direct payment was forthcoming from Desaru or MRCB, the plaintiff brought the present application before this court. C

THE APPLICATION UNDER S 30 CIPAA

[21] Section 30 of the CIPAA provides as follows:

> 30 Direct payment from principal D
>
> (1) If a party against whom an adjudication decision was made fails to make payment of the adjudicated amount, the party who obtained the adjudication decision in his favour may make a written request for payment of the adjudicated amount direct from the principal of the party against whom the adjudication decision is made. E
>
> (2) Upon receipt of the written request under subsection (1), the principal shall serve a notice in writing on the party against whom the adjudication decision was made to show proof of payment and to state that direct payment would be made after the expiry of ten working days of the service of the notice. F
>
> (3) In the absence of proof of payment requested under subsection (2), the principal shall pay the adjudicated amount to the party who obtained the adjudication decision in his favour.
>
> (4) The principal may recover the amount paid under subsection (3) as a debt or set off the same from any money due or payable by the principal to the party against whom the adjudication decision was made. G
>
> (5) This section shall only be invoked if money is due or payable by the principal to the party against whom the adjudication decision was made at the time of the receipt of the request under subsection (1). H

[22] The conditions which have to be satisfied before the plaintiff can invoke the remedy in s 30 of the CIPAA are well established, namely:

(a) there must be an adjudication decision whereby the winning party is entitled to an adjudicated amount which is to be paid by the losing party; I

(b) the losing party has failed to pay the adjudicated amount to the winning party;

(c) the winning party has made a written request to the principal for the adjudicated amount to be paid directly to the winning party;

(d) the principal did not serve a written notice to the losing party to show proof that the losing party has paid the adjudicated amount to the winning party or having served such notice, the losing party has failed to furnish the proof of payment and in any event, the principal did not pay the adjudicated amount directly to the winning party; and

(e) there is money due or payable by the principal to the losing party at the time when the principal receives the written request for payment from the winning party.

(See among others, *Murni Environmental Engineering Sdn Bhd v Eminent Ventures Sdn Bhd & Anor and other suits* [2016] MLJU 691; *CT Indah Construction Sdn Bhd v BHL Gemilang Sdn Bhd* [2017] MLJU 2275; [2018] 1 LNS 380 (HC); *HMN Nadhir Sdn Bhd v Jabatan Kerja Raya Malaysia & Ors* [2018] MLJU 1859; *B Cor Geotechnics Sdn Bhd v Panzana Enterprise Sdn Bhd* [2019] MLJU 1030; [2019] MLRHU 1040; *Cabnet Systems (M) Sdn Bhd v Dekad Kaliber Sdn Bhd & Anor* [2020] MLJU 311; [2020] 3 MLRH 83; *Glocal Tech Engineering Sdn Bhd v Panzana Enterprise Sdn Bhd* [2021] MLJU 474 and *Zedelta Sdn Bhd v Mayland Supreme Sdn Bhd* [2023] 10 MLJ 95.)

[23] In this case:

(a) the plaintiff has undoubtedly fulfilled conditions (a) and (b) in para 22 above as there is clearly, the AD wherein the plaintiff is entitled to the total adjudication sum which is to be paid by MRCB Builders and MRCB Builders has failed to pay the same to the plaintiff as at the date of filing of the OS;

(b) with regards to condition (c), irrespective of whether Desaru or MRCB is the 'principal' within the meaning of s 4 of the CIPAA, the plaintiff has taken the safe path by sending the Request — Desaru and Request — MRCB to pay the total adjudication sum directly to the plaintiff;

(c) with regards to condition (d), as Desaru and MRCB are each claiming that the other is the principal in the chain of construction contracts, neither party had served the written notice to MRCB Builders to show proof that MRCB Builders has paid the total adjudication sum to the plaintiff in accordance with the provision in sub-s 30(2) of the CIPAA. It is irrefutable that neither Desaru or MRCB has paid the total adjudication sum to the plaintiff; and

(d) with regards to condition (e), this is one of the two issues to be resolved in this suit.

FIRST ISSUE: WHO IS THE 'PRINCIPAL' IN THIS MATTER?

The parties' submissions

[24] The word 'principal' is defined in s 4 of the CIPAA to mean 'a party who has contracted with and is liable to make payment to another party where that other party has in turn contracted with and is liable to make payment to a further person in a chain of construction contracts'.

[25] The *plaintiff*'s position on this matter is straightforward, namely that:

(a) the word 'principal' in s 4 of the CIPAA is not limited between the plaintiff, MRCB and MRCB Builders only as the interpretation provision as above quoted includes the words '... to a further person in a chain of construction contracts';

(b) there is a principal-agent relationship between MRCB and MRCB Builders. This is consistent with the position taken by the plaintiff in the adjudication proceedings, and this was determined by the adjudicator in the plaintiff's favor (see paras 81–83 under Issue No 1 whether the respondent is the agent for MRCB in the AD, exh 'A1' in the plaintiff's AIS, encl 2). Legally, MRCB and MRCB Builders are to be treated as a unified entity (see *Yap Chee Hean v Public Investment Bank Bhd* [2014] 8 MLJ 494); and

(c) as there is no dispute between the plaintiff and MRCB Builders with regards to the principal-agent relationship, although the AD is against MRCB Builders, the same liability is extended on MRCB by virtue of the agency principle. Hence, the 'principal' for purposes of the s 30 of the CIPAA application would be Desaru.

[26] *MRCB* took a similar stance as the plaintiff. It was further submitted that:

(a) MRCB appointed MRCB Builders to act as its agent to carry out all the matters necessary in relation to the project whereby ostensible authority was given to MRCB Builders to enter into subcontracts with subcontractors for the construction and completion of the project;

(b) the relationship between MRCB and MRCB Builders was within the full knowledge of Desaru and accepted by Desaru as evidenced by the fact that Desaru had accepted MRCB Builders' signature on the 'Contractor's Acknowledgement' portion of the employer's representative's instructions ('ERI') which was issued by Desaru to MRCB even though the contract is ostensibly between MRCB and Desaru;

(c) the appointment of an agent does not need to be in writing and the existence of a relationship of principal and agent can be inferred from the circumstances of the case; and

(d) Desaru should be regarded as the 'principal' under s 4 of the CIPAA because MRCB and MRCB Builders should be treated as a single entity in the chain of construction contracts. Moreover, there is no set boundary to the definition of 'principal' and the term is wide enough to include an employer, a main contractor or a subcontractor in a chain of construction contracts, and specifically, Desaru, in line with the spirit and intent of the CIPAA and s 17A of the Interpretation Acts 1948 and 1967 (Act 388).

[27] At the opposite end, *Desaru* strenuously asserted that MRCB is the defined principal under ss 4 and 30 of the CIPAA with the plaintiff as the winning party and MRCB Builders as the losing party in the adjudication. Desaru relied on the fact that MRCB Builders has been making payments directly to the plaintiff for works done.

[28] Desaru also sought to distinguish the decision in *Yap Chee Hean* on the ground that, in that case, an agreement was entered into between the parties clearly stipulating the agency relationship whereas in the present case before this court, MRCB did not produce any agency agreement between itself and MRCB Builders.

[29] It was further emphasised that, in the LoA, MRCB addressed itself as the 'Main Contractor' and had appointed the plaintiff as the 'Sub-Contractor' for the M&E works. There was no express provision that MRCB Builders was acting as the agent of MRCB.

The findings of the court

[30] As alluded to earlier, at the adjudication, the adjudicator had considered the statements in the adjudication response and adjudication reply and found that there is no question as to the existence of a principal-agent relationship between MRCB and MRCB Builders (paras 81–83 of the AD).

[31] The adjudicator then analysed Issue No 2 what is the limit of authority if the respondent is the agent for MRCB and adverted to the fact that MRCB Builders refused to disclose the agency agreement entered into between MRCB and MRCB Builders despite the adjudicator's request for it vide Procedural Order No 3 so as to understand the limit of authority given by MRCB to MRCB Builders and whether the latter had acted intra vires or ultra vires. The reason for the refusal is that the agreement contains sensitive information. In the absence of the agency agreement, the adjudicator looked to the terms of the

LoA and upon his review of the IPCs, invoices and payment proof in the plaintiff's further submission, he determined that payments were made by MRCB Builders to the plaintiff; the obligation to make payment for the plaintiff's work rests with MRCB Builders; and the contractual obligation to make payment for work done ought reasonably to be performed by MRCB Builders (see paras 84–92 in the AD).

[32] Desaru has, of course, correctly submitted that this court is not bound to follow the decision of the adjudicator on the issue of whether MRCB Builders is the agent for MRCB. This court has to make its own independent assessment of the matter based on the averments and submissions of the parties in this suit. After careful consideration of the same, the court makes the following findings:

(a) although in the LoA, MRCB Builders was called the 'Main Contractor' and it had appointed the plaintiff as the 'Sub-Contractor' for the M&E works, in the adjudication proceedings, MRCB Builders, and in the present suit, MRCB, have both taken the consistent position that MRCB had appointed MRCB Builders to act as MRCB's agent to carry out all matters necessary relating to the project. MRCB affirmed that it has given MRCB Builders ostensible authority to enter subcontracts with subcontractors for the construction and completion of the project and that MRCB Builders operates as a single economic unit as part of MRCB (see para 9, encl 6). Similarly, the plaintiff's stand is that MRCB has appointed the plaintiff through its agent, MRCB Builders and therefore the employer and the principal for the project is Desaru (see paras 4 and 5, encl 2);

(b) the non-production of an agency agreement between MRCB and MRCB Builders is not fatal to MRCB's contentions on this issue, and nor should an adverse inference be drawn against MRCB, as the existence of a relationship of principal and agent can be inferred from the circumstances of the case.

In *KGN Jaya Sdn Bhd v Pan Reliance Sdn Bhd* [1996] 1 MLJ 233, the Court of Appeal heard the appeal against the decision of the High Court in entering summary judgment in favor of the respondent. The respondent, who carried on the business of an insurance agent, alleged that it had appointed the appellant as its sub-agent to sell policies of Mercantile Insurance Sdn Bhd to the public. The respondent had sent statements of account to the appellant which reflected the money which had been received by the appellant from the sales that he had made. However, the appellant failed to pay the respondent and in its defence to the suit initiated by the respondent, the appellant denied the sub-agency. In the appeal, the appellant argued, inter alia, that the judge was wrong as the respondent had not produced any written agreement to support its

claim that the appellant had been appointed as its sub-agent. Gopal Sri Ram CJA in delivering the judgment of the court dismissing the appeal, held at pp 237–238 that:

> In the first place, *the law does not require that an agency or sub-agency agreement must be in writing*. See *Bowstead & Reynolds on Agency* (17th Ed) at p 55 et seq.
>
> Further, *Part X of the Contracts Act 1950, which contains the relevant provisions on agency does not contain any requirement that the appointment of an agent or sub-agent has to be in writing or be evidenced in writing. Hence the appointment may be express or implied, that is to say, it may be gathered from the facts and circumstances of a case and from the conduct of the parties*: see *Kuchwar Lime & Stone Co v Dehri Rohtas Light Railway & Co Ltd AIR* [1969] SC 193.
>
> Another way of stating the proposition is that *a party may, by his conduct in all the circumstances of a particular case, be estopped from asserting the absence of an agency relationship between him and he who claims to be his principal*.
>
> Viewed in this way, we perceive that *the key to the whole case lies in the conduct of the appellant in this case*. Encik Darshan Singh, in response to a question put to him by a member of the panel hearing this appeal, frankly conceded that his client did indeed receive the statements of account of which we have earlier spoken. It follows that a reasonable man similarly circumstanced as the appellant would, if it were really true that there had been no appointment of sub-agency as later claimed by it, have, post haste sent these accounts back to the respondent and denied any liability.
>
> But that is not what happened. The appellant remained silent, held onto the accounts, and did nothing about it. The denial by its solicitor's letter of 4 January 1993, came long after the delivery of the account.
>
> ...
>
> ... We are left in no doubt that the undisputed facts of this case admit of the conclusion that the respondent was, by the conduct of the appellant, lulled into the belief that the appellant had no challenge to the accounts, leave alone the legal relationship between the parties.
>
> To put it another way, *the appellant, by its silence coupled with the other circumstances of the case, encouraged the respondent to believe that it intended to raise no challenge to the existence of a prior legal relation between the parties* or to the figure which the account showed as owing by it. *Having done so, it ought not to be permitted to now contend otherwise*.
>
> It follows that it does not, therefore, lie in the mouth of the appellant to now deny the respondent's claim. It would be plainly inequitable to do so. An examination of the facts leads us to this conclusion. The legal basis upon which such a conclusion may be sustained is well- settled and is now beyond question (see *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331). (Emphasis added.)

In the case which was cited by MRCB's counsel namely, *Sri Sutera Sdn*

Bhd v Mohamed bin Abid and another appeal [2004] 2 MLJ 321, reference was made to the decision of the Court of Appeal as above cited in the following passage at p 326:

> [5] On the issue of agency, the learned judge concluded that from the evidence he found as a fact that the second defendant was an agent of the first defendant with authority to bind the first defendant as shown by the fact that he could sign for and on behalf of the first defendant in respect of the agreement with the said Tengku Ahmad Faizal. *He relied on the authority of KGN Jaya Sdn Bhd v Pan Reliance Sdn Bhd* [1996] 1 MLJ 233, *where the court held that the appointment of an agent need not be in writing and that the existence of a relationship of principal and agent can be inferred from the circumstances of the case*. He also referred to *Treitel in the Law of Contract* (1995 Ed) which listed the four conditions that ought to be satisfied before apparent or ostensible authority arises and concluded that the facts clearly showed all the conditions had been satisfied. In arriving at such conclusion, he also took into account of the fact that: (i) the second defendant had admitted to the plaintiff that he was a director of the first defendant; (ii) when the plaintiff first met DW1 concerning his claim to the cars DW1 did not dispute the representation that the second defendant was a director of the first defendant; (iii) DW1 signed the letter of confirmation as stated in para 4 above; and (iv) the plaintiff and PW2 believed that the second defendant was acting as the agent of the first defendant because they believed that as an individual the second defendant would not have been able to obtain more than one AP, as deposed without challenge.
>
> [6] A scrutiny of the judgment will reveal that the learned judge came to his findings and conclusions on the issue of agency based on the totality of the evidence adduced, that is to say, the combined effect of the events that took place from the time when the oral agreement was concluded between the plaintiff and the second defendant in the middle of 1992 until 2 December 1992 when the letter of confirmation was issued by DW1 to the plaintiff. We are satisfied with the approach taken by the learned judge in considering the issue. (Emphasis added.)

To further strengthen his arguments, MRCB's counsel additionally referred to s 140 Contracts Act 1950 (Act 136) which stipulates as follows:

> An authority is said to be express when it is given by words spoken or written. An authority is said to be implied when it is to be inferred from the circumstances of the case; and things spoken or written, or the ordinary course of dealing, may be accounted circumstances of the case.

(c) in the employer representative's instruction ('ERI') Nos 125-EI-WSP-WD-002, 128-EI-WSP-WD-005 and 131-EI-WSP-WD-008 (see exh 'MRCB9', encl 13), Rozai bin Rosli, MRCB Builder's project director has signed in the *Contractor's Acknowledgement* column on 24 July 2018 and 27 July 2018 while Muhinder Singh has placed his

signature as the *Employer's Representative* on 23 July 2018 and 27 July 2018. There is no evidence that Desaru had questioned the authority of a representative of MRCB Builder to sign the said ERIs for and on behalf of MRCB in respect of the contract between Desaru and MRCB.

[33] In the circumstances, the court is satisfied that a principal-agent relationship between MRCB and MRCB Builders has been established by the plaintiff and MRCB, and this relationship was recognised and accepted by Desaru at all material times during the construction period.

[34] By its conduct, Desaru has treated MRCB and MRCB Builders as one and the same. Consequently, MRCB and MRCB Builders have been placed on the same lateral level in the chain of construction contracts as the main contractor for the project and this would mean that Desaru is the employer of the project and the 'principal' for purposes of s 30 of the CIPAA.

SECOND ISSUE: WHETHER THERE ARE MONIES DUE AND OWING BY DESARU AS THE PRINCIPAL TO MRCB BUILDERS AT THE TIME OF DESARU'S RECEIPT OF THE REQUEST — DESARU ON 27 JULY 2022

[35] In para 11 of Desaru's AIR (encl 7), Desaru affirmed that it was only notified by the plaintiff's solicitors via the letter dated 27 July 2022 that the plaintiff has obtained the AD against MRCB Builders and that the plaintiff is now seeking for a direct payment from Desaru. However, unlike MRCB (see para 20 in MRCB's second AIR, encl 6 where the date of receipt is stated as 27 July 2022), Desaru did not aver as to the exact date that it had received the plaintiff's request.

[36] In exh 'A3' in the plaintiff's AIS (encl 2), Themed Attractions Resorts 7 Hotels Sdn Bhd had acknowledged receipt of the Request — Desaru by signing and placing its chop on the service copy. The date as can be seen in the chop is 27 July 2022.

[37] Desaru did not raise any issue concerning the service of the Request — Desaru. In the circumstances, and for purposes of analysing the second issue, the date on which Desaru received the Request — Desaru is taken as 27 July 2022.

The parties' submissions

[38] The *plaintiff* submitted that Desaru is obligated to make payment of the adjudicated sum to the plaintiff pursuant to sub-s 30(3) of the CIPAA as Desaru did not issue the notice as required under sub-s 30(2) of the CIPAA in

line with the authority in *PCOM Pacific Sdn Bhd v Apex Communications Sdn Bhd* [2020] MLJU 118. The non-issuance of the said notice is said to be fatal and Desaru could no longer raise the argument that there are no monies due or payable to MRCB.

[39] However, *Desaru* countered this contention by relying on the decisions in *CT Indah Construction Sdn Bhd v BHL Gemilang Sdn Bhd* [2017] MLJU 2275; [2018] 1 LNS 380, *Chong Lek Engineering Works Sdn Bhd v PFCE Integrated Plant and Project Sdn Bhd and another case* [2020] MLJU 2389 and *Glocal Tech Engineering Sdn Bhd* in arguing that, even if Desaru is regarded as the principal, s 30 CIPAA cannot be invoked against Desaru as there is no sum due and/or payable by Desaru to MRCB because:

(a) upon the assessment and valuation by KPK Quantity Surveyors (Semenanjung) Sdn Bhd, the quantity surveyor for the contract between Desaru and MRCB, there is a sum of RM55,016,034.64 which is due and/ or payable by MRCB to Desaru under Interim Certificate No 45, being the value of the non-conformance works, defect rectification works and liquidated and ascertained damages ('LAD') imposed on MRCB; and

(b) in view of the dispute resolution agreement ('DRA') entered into by Desaru, Desaru Convention Centre Sdn Bhd, Desaru Estate Sdn Bhd, Desaru Peace Holdings Club Sdn Bhd and Desaru Peace Holdings Villas Sdn Bhd and MRCB on 3 December 2019, the parties thereto have agreed to fully and comprehensively resolve all their disputes by way of arbitration in accordance with the arbitration clauses in the respective construction contracts, including the contract between Desaru and MRCB dated 24 March 2016 in respect of the project. Hence, even if there were claims made by the plaintiff to MRCB, such claims are not due and payable as between Desaru and MRCB until the final determination of the ongoing arbitration. Desaru relied on the case authority of *Puncak Alam Housing Sdn Bhd (formerly known as Bukit Cerakah Development Sdn Bhd) v Menta Construction Sdn Bhd & Anor* [2014] 1 MLJ 287 to support its argument that a court shall be cautious in deciding whether to interfere with settlement agreements between the parties.

[40] MRCB retorted that there is in fact monies due and owing from Desaru to MRCB and/or MRCB Builders as:

(a) the sum of RM55,016,034.64 allegedly due and/or payable by MRCB to Desaru shows that there is in fact monies due and owing under Interim Certificate No 45. However, these monies have been zeroized by Desaru by unilaterally imposing claims of, inter alia, LAD on MRCB which is disputed in arbitration;

(b) sub-s 30(4) of the CIPAA allows Desaru to recover the said amount either as a debt or as set off from MRCB. Any adjustments for the amount payable can be made in arbitration; and

(c) the instant application is not caught by the DRA and in any event, the DRA cannot operate to restrict the enforcement of a statutory right under s 30 of the CIPAA by the plaintiff to seek direct payment from Desaru.

The findings of the court

[41] The court has scrutinised the parties' averments, and in particular paras 10 to 15 of MRCB's second AIR (encl 13) and finds that the plaintiff's claim for payment under IPC No 31 is for six variation orders pursuant to the Engineer's Instructions ('EI') EI-WSP-WD-002, EI-WSP-WD-005, EI-WSP-WD-006, EI-WSP-WD-008, EI-WSP-WD-009 and EI-WSP-WD-010. However, Desaru has certified and made payments only in respect of the following:

(a) EI-WSP-WD-006 for additional pressurisation system and smoke fill system for the sum of RM320,000;

(b) EI-WSP-WD-009 for additional works for street lighting in the sum of RM210,000; and

(c) EI-WSP-WD-010 for additional works for telephone and structure cabling system in the sum of RM276,684.

[42] The total amount paid for the above stated variation orders is RM806,684 vide Interim Certificate No 36 dated 13 September 2018 (see exh 'MRCB8', encl 13 and Desaru's letter dated 5 February 2021 to MRCB in exh 'SAL2', encl 7 wherein MRCB stated that it will be making payment of a total sum of RM11,277,431.25 being the payments for the sums certified in Interim Certificate Nos 36 to 45, which includes the sum of RM5,473,502.42 for Interim Certificate No 36, out of which the sum of RM1,000,744.31 is for variation works done).

[43] To augment its point, MRCB has averred that for each outstanding EI, there is a corresponding ERI issued by Desaru to confirm and formalise the EI as illustrated below:

EI	ERI
EI-WSP-WD-002	ERI 125
EI-WSP-WD-005	ERI 128
EI-WSP-WD-008	ERI 131

[44] In the premises, it can be safely concluded that there are monies due or payable by Desaru to MRCB in respect of the variation orders under EI-WSP-WD-002, EI-WSP-WD-005 and EI-WSP-WD-008 and this was conceded by Desaru's counsel during the hearing on 16 January 2023.

[45] Finally, with regards to the submission based on the DRA, in my opinion, MRCB's points in refuting Desaru's reliance on the DRA are sound in law. The case as cited by Desaru does not concern an application under s 30 of the CIPAA. The present application was initiated by the plaintiff, who is not a party to the DRA. The DRA cannot override the plaintiff's right to invoke the direct payment mechanism as statutorily provided in the CIPAA. I agree with MRCB's submission that Desaru's DRA-related argument is nothing more than a red herring.

PRONOUNCEMENT

[46] Premised on all the above said considerations, the plaintiff's application was allowed in the terms as set out in para 3 of this judgment.

[47] The decision to order Desaru to pay interest on the adjudicated sum, party-to-party cost and the costs and expenses of the adjudication, apart from the adjudicated sum as prayed in para (i) of the OS, was made under para (iii) of the same as the court takes the view that it is fit and proper for the total adjudication sum to be paid directly by Desaru to the plaintiff consistent with the decision of the Court of Appeal on 9 December 2022, in reversing the decision of this court in *Bond M&E Sdn Bhd v Pali PTP Sdn Bhd* [2022] 11 MLJ 58; [2022] 5 CLJ 543; [2022] 5 MLRH 279, that a proper construct of the term 'adjudicated amount' in s 30 of the CIPAA would include both interest and costs awarded in the adjudication decision.

Order accordingly.

Reported by Ashok Kumar